UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
---X 15 CV 2819 (LDW) (GRB)
RICHARD CORTES,

Plaintiff, **NOTICE OF MOTION**

-against-

MAKO SECURITY, INC. D/B/A
THE MAKO GROUP, SHARON SANDLER,
ADDY SANDLER, and SHAY GANDOFF,

Defendants.
---X

PLEASE TAKE NOTICE that upon the annexed memorandum of law, the exhibits attached hereto, and upon the pleadings herein, Defendants will move this Court, before the Honorable Leonard D. Wexler, for an Order pursuant to rule 12(b)(1) of the Federal Rules of Civil Procedure dismissing all of Plaintiff, Richard Cortes's claims against Defendants MAKO Security, inc. D/b/a The MAKO group, Sharon Sandler, Addy Sandler, and Shay Gandoff.

Dated: August 31, 2016
Forest Hills, New York

Sincerely Yours,
Gordon & Gordon, P.C.

Supriya Kichloo, Esq.
Attorneys for Plaintiff
108-18 Queens Blvd., 6th Fl.
Forest Hills, NY 11375

To: Justin Reilly, Esq.
Neil H. Greenberg & Associates, P.C.
4242 Merrick Road,
Massapequa, New York 11758
justin@nhglaw.com

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
--X
RICHARD CORTES,

Plaintiff, **15 CV 2819 (LDW) (GRB)**

-against-

MAKO SECURITY, INC. D/B/A
THE MAKO GROUP, SHARON SANDLER,
ADDY SANDLER, and SHAY GANDOFF,

Defendants.
--X

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS 12(b)(1) MOTION TO DISMISS

Gordon & Gordon, P.C.
Supriya Kichloo, Esq.
Attorneys for Plaintiff
108-18 Queens Blvd., 6th Fl.
Forest Hills, NY 11375
718-544-7070
718-544-0994

TABLE OF CONTENTS

INTRODUCTION....................1

BACKGROUND....................2-3

ANALYSIS....................3-10

a. Standard of Review....................3-4
b. Mootness doctrine....................4-5
c. Former Lawsuit....................5-7
d. Rule 68 Offer of Judgment and FLSA....................7-10

CONCLUSION....................10

TABLE OF AUTHORITIES

Case Law

Abrams v. Interco Inc., 719 F.2d 23 (2d Cir.1983)..........4

Ambalu v. Rosenblatt, 194 F.R.D. 451 (E.D.N.Y.2000)..........8,9

Bhd. of Locomotive Eng'rs Div. 269 v. Long Island R.R. Co., 85 F.3d 35 (2d Cir.1996)..4

Briggs v. Arthur T. Mott Real Estate LLC, 2006 WL 3314624 *3 (E.D.N.Y.2006)........8

Church of Scientology v. United States, 506 U.S. 9 (1992)..........7

Darboe v. Goodwill Industries of Greater NY & Northern NJ, Inc., 485 F. Supp.2d 221 (EDNY 2007)..........7

DeFunis v. Odegaard, 416 U.S. 312 (1974)..........4

Doyle v. Midland Credit Mgmt., Inc., 722 F.3d 78 (2d Cir.2013)..........9

Filetech S.A. v. France Telecom S.A., 157 F.3d 922, 932 (2d Cir.1998)..........3

Fox v. Bd. of Trustees of the State Univ. of N.Y., 42 F.3d 135 (2d Cir.1994)..........4,7

Genesis Healthcare Corp. v. Symczyk, 133 S.Ct. 1523 (2013)..........4,9

Jarvis v. Cardillo, 1999 WL 187205, (S.D.N.Y. April 6, 1999)..........3

Louisdor v. American Telecommunications, Inc., 540 F.Supp.2d 368 (2008)..........7

Marek v. Chesny, 473 U.S. 1 (1985)..........8

Phifer v. City of N. Y., 289 F.3d 49 (2d Cir.2002)..........3

Vogel v. American Kiosk Management, 371 F.Supp.2d 122, 128 (D.Conn.2005)..........8

Ward v. Bank of New York, 455 F.Supp.2d 262 (2006)..........4,8

Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi, 215 F.3d 247 (2d Cir.2000).......3

Statutory Authority

28 U.S.C.A §1367..........1

29 U.S.C.A §216(b)..........1,9

29 U.S.C.A. §207..........2

Fed. R. Civ. P. 12(b)(1)..........3

Fed. R. Civ. P. 68..........3,8

NY Labor §650 *et seq*..........2

U.S.C.A. Const. Art. 3, § 2, cl. 1 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
---X
RICHARD CORTES,

Plaintiff, 15 CV 2819 (LDW) (GRB)

-against-

MAKO SECURITY, INC. D/B/A
THE MAKO GROUP, SHARON SANDLER,
ADDY SANDLER, and SHAY GANDOFF,

Defendants.
---X

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS RULE 12(b)(1) MOTION TO DISMISS PLAINTIFF'S FLSA AND NYLL CLAIMS

Defendants, Mako Security, Inc. d/b/a The Mako Group, ("Mako") Sharon Sandler, Addy Sandler, and Shay Granov, sued herein incorrectly as Shay Gandoff (collectively, "Defendants"), by and through their attorneys, Gordon & Gordon, P.C., move to dismiss plaintiff, Richard Cortes's ("Cortes") Federal Labor Standards Act ("FLSA) and the New York State Labor Laws (NYLL) overtime claims for lack of subject matter jurisdiction, pursuant to rule 12(b)(1) of the Federal Rules of Civil Procedure.

INTRODUCTION

Cortes commenced this action against Mako for failure to pay overtime wages. This Court has federal jurisdiction pursuant to 29 U.S.C §216(b) and supplemental jurisdiction over the state labor law claims pursuant to 28 U.S.C §1367. Defendants made a pre-answer offer of judgment, pursuant to Rule 68 of the Federal Rules of Civil Procedure, and now move to dismiss the action, on the basis of a lack of subject matter jurisdiction. Defendants argue that their offer exceeds the plaintiff's maximum recovery under the

FLSA and thus the Court should dismiss plaintiff's federal claim as moot. Defendants further argue that having dismissed plaintiff's federal claim, the Court should decline to exercise supplemental jurisdiction over plaintiff's state law claims.

BACKGROUND

Mako, a distributor of weapon accessories, employed Cortes as a warehouse employee from January 2010 until December 2013.[1] He worked 9-5 from Monday-Thursday and 9-4 on Fridays; with an unpaid 30 minute lunch break every day. He worked 37.5 hours per week and worked overtime sporadically, usually during the holiday season. See annexed hereto **Exhibit A**, timesheets for Cortes for the years 2010-2013.

In May 2015, the plaintiff, as an individual, commenced the above captioned action against the defendants for failure to pay overtime wages.[2] Count I of the Complaint alleged failure to pay overtime pursuant to the FLSA (29 U.S.C. §207) and Count II alleges the failure to pay wages violates the NYLL section §650 *et seq*, over which this Court has supplemental jurisdiction. See annexed hereto **Exhibit B**, Complaint. On June 23, 2015, Mako made an offer of judgment to Cortes for the total sum of Six Thousand One Hundred Seventy Six Dollars and Fifty Eight Cents ($6,176.58), plus reasonable attorneys' fees, expenses and costs accrued to the date of this offer for plaintiff's federal claims. The offer specified that Cortes had thirty (30) days, until July 24, 2015 to accept the offer. Cortes neither accepted nor rejected the offer and the case proceeded as scheduled. Discovery in this case was completed on June 6, 2016 and now Mako brings this motion to dismiss plaintiff's claims for lack of subject matter jurisdiction.

---

[1] The complaint incorrectly states the plaintiff's employment period from 2009-December 2014 but the employment records provided by the Defendants clearly show that the plaintiff was employed between 2010-2013. For the purposes of this motion, the relevant employment time period is going to be 2010-2013.

[2] It is worth noting that the plaintiff did not bring this suit on behalf of other employees similarly situated and at no point did the plaintiff attempt to certify the instant action as a class action, therefore this motion deals solely with the plaintiff's individual claims.

ANALYSIS

Standard of Review

"Where defendant offers plaintiff all the relief sought, the plaintiff is said to lose his personal stake in litigation and the issues in the action are no longer considered live; under these circumstances, subject matter jurisdiction ceases to exist and the case is properly dismissed." U.S.C.A. Const. Art. 3, § 2, cl. 1; Fed.Rules Civ.Proc.Rules 12(b)(1), 68. In considering a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), federal courts "need not accept as true contested jurisdictional allegations." Jarvis v. Cardillo, No. 98 Civ. 5793(RWS), 1999 WL 187205, at 2 (S.D.N.Y. April 6, 1999). Rather, a court may resolve disputed jurisdictional facts by referring to evidence outside the pleadings. See Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi, 215 F.3d 247, 253 (2d Cir.2000); Filetech S.A. v. France Telecom S.A., 157 F.3d 922, 932 (2d Cir.1998). "A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." Phifer v. City of N. Y., 289 F.3d 49, 55 (2d Cir.2002).

In the instant action, the issue is whether the offer adequately satisfies the plaintiff's claims. The timesheets, time card reports, payroll summary and the accompanying exhibits used to calculate the rule 68 offer in the instant action will demonstrate that the offer of $6,176.58 plus reasonable attorneys' fees, expenses and costs is the maximum relief Cortes is entitled to under the FLSA.

If the Court finds that the offer fully satisfies the plaintiff's claims, then it should dismiss Cortes's FLSA claims and decline to exercise supplemental jurisdiction over the state law claims, see Bhd. of Locomotive Eng'rs Div. 269 v. Long Island R.R. Co., 85 F.3d 35, 39 (2d Cir.1996). When all federal claims in a case are dismissed, leaving only state law claims, it is within the discretion of the district court to exercise supplemental jurisdiction over the remaining state law claims. 28 U.S.C.A. § 1367(c)(3).

Mootness Doctrine

Article III of the United States Constitution "limits the jurisdiction of federal courts to 'Cases' and 'Controversies.' " Genesis Healthcare Corp. v. Symczyk, 133 S.Ct. 1523, 1528, 185 L.Ed.2d 636 (2013). When the parties lack a legally cognizable interest in the outcome of an action, the action becomes moot, and, accordingly, the court no longer has jurisdiction over the action. Fox v. Bd. of Trustees of the State Univ. of N.Y., 42 F.3d 135, 140 (2d Cir.1994). "Federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." DeFunis v. Odegaard, 416 U.S. 312, 316, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974). Thus, in general, when a defendant offers a plaintiff the maximum the plaintiff could possibly recover at trial, no justiciable controversy remains, as the offer moots the action. Ward v. Bank of New York, 455 F.Supp.2d at 267 (2006) (citing Abrams v. Interco Inc., 719 F.2d 23, 32 (2d Cir.1983)). Cortes began working for Mako in 2010 up until he resigned in December 2013. His hourly rate of pay started from $10.00 in 2010 and increased to $18 in 2013, in increments. See annexed hereto **Exhibit C**, transaction summary for Richard Cortes. Prior to September 2012, Mako kept track of the hours worked by employees in an excel spreadsheet and then use that spreadsheet to calculate the amount of wages owed to the employees. Defendants use a bi-monthly method of payment. They manually calculated the total numbers of hours worked each bi-monthly payment schedule and then compensated for overtime. Overtime, by law, is paid at the rate of time and a half for any time worked over forty hours in a week. Defendants came to know of their error in calculating overtime well after a more sophisticated system was installed in September 2012. After September 2012, the defendants installed an automatic punch clock system, which recorded all the hours worked by the employees and automatically calculated, what overtime, if any is owed.[3] See annexed hereto **Exhibit D**, time card report.

Former Lawsuit

Defendants are familiar with this Court as former employees, represented by current plaintiff's counsel, brought an identical action against the defendants.[4] The former lawsuit had four (4) plaintiffs, who alleged Mako failed to pay them overtime wages. This lawsuit enlightened the defendants to the fact they were miscalculating what was owed in overtime to the former employees. Prior to the commencement of the former lawsuit, defendants did attempt to compensate the former employees for wages owed, but they were unaware of the fundamental principle of liquidated damages and ultimately the matter was resolved in an out of Court settlement.

When Cortes commenced this lawsuit in 2015, by and through counsel that had represented Cortes's former colleagues in the former lawsuit, Mako immediately recognized that like the former employees, his overtime wages were also miscalculated and thus they referred to all the timesheets to calculate what was owed to Cortes and made a rule 68 offer. In fact, prior to the commencement of the instant lawsuit, defendant Mako paid plaintiff Cortes wages for overtime owed in 2010. See annexed hereto **Exhibit E,** copy of a check. This occurred after the former lawsuit had started, therefore Mako knew that it owed Cortes overtime wages as well.

---

[3] The errors in calculations arose prior to September 2012 because after September the automated punch clock system accurately calculates overtime at the time and a half rate.
[4] The timesheets annexed as Exhibit A, were the same timesheets that were used in the previous case that was settled in 2014. The names of the former employees are stated on these timesheets, along with Cortes.

Throughout the course of the former lawsuit and the instant action, defendants have never denied that they made errors in calculations, which is why the employees were not paid the overtime wages that they were owed. Furthermore, failure to pay overtime was due to miscalculations on part of the defendants because of the manual system they used prior to September 2012. However, Mako paid Cortes straight time for all the hours worked, therefore to calculate the wages owed to Cortes, the halftime rate, not the overtime rate of time and a half was the appropriate method of calculation to utilize. The same method was used to calculate wages owed to the former employees of Mako and that was deemed sufficient, when the matter was resolved in 2014. In the former lawsuit and the instant action, the employees were paid their hourly rate for all hours worked. The errors arose because Mako was calculating overtime on a bi-weekly basis, where as the correct application is to calculate how many hours an employee worked over 40 hours in a regular work week. Based on the lesson learnt and the records in possession of the defendants, they made an offer to Cortes knowing full well that it is for the maximum relief he is entitled to under FLSA. Since Cortes has not accepted the rule 68 offer, defendants bring this motion to dismiss because Cortes was already offered the relief he seeks by the Court and no longer has a personal stake in the outcome of litigation anymore.

Thus, "if an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Id.* In the instant case, the defendants used the timesheets to calculate the hours Cortes worked overtime and how much wages he was owed for those hours worked. Cortes also used the same timesheets throughout discovery, never raising any disputes regarding their accuracy. Defendant's Rule 68 offer of judgment, which equals the maximum amount Plaintiff could recover at trial, has eliminated Plaintiff's individual stake, and, therefore, no justiciable controversy remains. Louisdor v. American Telecommunications, Inc. Id at 373.

Rule 68 Offer of Judgment and FLSA

Under the FLSA, an employee is entitled to a specified minimum hourly wage and, for all hours worked in excess of forty hours per week, one-and-a-half times the employee's regular hourly rate. 29 U.S.C. §§ 206(a), 207(a)(1). An employer that violates these requirements is liable to the affected employee or employees in the amount of the unpaid minimum wages and the unpaid overtime compensation, plus an equal amount in liquidated damages, as well as reasonable attorneys' fees and costs. *Id.* § 216(b). Church of Scientology v. United States, 506 U.S. 9, 12, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992); see also Fox v. Bd. of Trs. of the State Univ. of New York, 42 F.3d 135, 140 (2d Cir.1994).

The mootness doctrine has been applied in the context of FLSA collective action overtime cases where defendants have offered the named plaintiff the full relief sought and no other parties have opted in to the action. Darboe v. Goodwill Industries of Greater NY & Northern NJ, Inc., 485 F. Supp.2d 221 (EDNY 2007).

Rule 68 allows a defendant to "serve on an opposing party an offer to allow judgment on specified terms ...." FED. R. CIV. P. 68(a). If, within fourteen days of service, the opposing party accepts the offer, "either party may then file the offer and notice of acceptance ... [and][t]he clerk must then enter judgment." FED. R. CIV. P. 68(a). However, where the opposing party does not accept the offer, "[i]f the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made." FED. R. CIV. P. 68(d). The rule is intended "to encourage settlement and avoid litigation." Marek v. Chesny, 473 U.S. 1, 5, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985). "Rule 68 offer of full damages, even if rejected, renders the case moot and subject to dismissal." Ward v. Bank of New York, 455 F.Supp.2d 262, 270 (S.D.N.Y.2006); Briggs v. Arthur T. Mott Real Estate LLC, 2006 WL 3314624 *3 (E.D.N.Y.2006); Vogel v. American Kiosk Management, 371 F.Supp.2d 122, 128 (D.Conn.2005)."

"Where no other similarly situated individuals have opted in and the offer of judgment satisfies all damages of the plaintiff, plus all costs and attorney's fees ... courts have held that a Rule 68 offer of judgment moots an FLSA class action thereby depriving the court of subject matter jurisdiction." Briggs v. Arthur T. Mott Real Estate LLC, No. 06-0468, 2006 U.S. Dist. LEXIS 82891, at *6-7, 2006 WL 3314624 (E.D.N.Y. Nov. 14, 2006) (citing, inter alia, Ward v. Bank of New York, 455 F.Supp.2d 262 (S.D.N.Y.2006); Vogel v. Am. Kiosk Mgmt., 371 F.Supp.2d 122 (D.Conn.2005)). See also, Ambalu v. Rosenblatt, 194 F.R.D. 451, 453 (E.D.N.Y.2000).

Offer of full damages in FLSA collective action overtime case, even if rejected, renders case moot and subject to dismissal where no other parties have opted in to action.

Fed.Rules Civ.Proc.Rule 68, 28 U.S.C.A.; Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C.A. § 216(b). Only Cortes's individual claims are at stake here. His hourly rate of pay was $10 in 2010, $12-$14 between 2011-2012 and $18 in 2013. Mako used $18 as Corte's pay rate to calculate the halftime and overtime rate, and using the timesheets, payroll summary and time card reports, annexed hereto as **Exhibit A**, **C** and **Exhibit D**, calculated that Cortes was owed $6,176.58, which includes liquidated damages. Mako used a higher rate of pay to calculate what was owed and Cortes cannot recovery more than $6,176.58 for his FLSA claims.

In the Second Circuit, a Rule 68 offer of judgment can moot a case, and thus divest the court of subject matter jurisdiction, if the offer equals or exceeds the amount of relief claimed by the plaintiff. See Doyle v. Midland Credit Mgmt., Inc., 722 F.3d 78, 80 (2d Cir.2013) (holding that district court properly dismissed the action for lack of subject matter jurisdiction where the defendant offered "the full amount of relief sought by [the plaintiff]"); see also Abrams v. Interco Inc., 719 F.2d 23, 32 (2d Cir.1983) ("[T]here is no justification for taking the time of the court and the defendant in the pursuit of ... claims which [the] defendant has more than satisfied.").

In Genesis Healthcare Corp. v. Symczyk, the United States Supreme Court recently held that an FLSA action brought on behalf of a named plaintiff and other "similarly situated" employees is no longer "justiciable when the lone plaintiff's individual claim becomes moot." 133 S.Ct. at 1526.

While plaintiff might argue that defendants actions were willful, his counsel is well aware that the opposite is true. Based on previous lawsuit, this is purely a calculation in error and defendants stance on the matter is unyielding. We however offered judgment for all years worked, up until 2010. The offer more than meets the maximum relief Cortes is entitled to under FLSA.

Conclusion

Pursuant to Rules 12(b)(1) of the Federal Rules of Civil Procedure, Defendants now move to dismiss the instant action on the ground that it has offered full relief to Plaintiff Cortes on his sole federal claim in accordance with Rule 68 of the Federal Rules of Civil Procedure. Defendants contend that Cortes's claims are moot, and that the Court therefore lacks subject matter jurisdiction over this action, because Defendants served, and Plaintiffs rejected an offer of judgment that exceeded the maximum relief available. If a controversy is moot, then the Court lacks subject matter jurisdiction over the action. Furthermore, when all bases for federal jurisdiction have been eliminated, the federal court should ordinarily dismiss the remaining state law claims. In conclusion, defendants move to dismiss both, federal and state labor law claims the plaintiff has asserted against them and to dismiss the instant action in its entirety.

Respectfully submitted,
Gordon & Gordon, P.C.

Supriya Kichloo, Esq.
Attorneys for Plaintiff
108-18 Queens Blvd., 6th Fl.
Forest Hills, NY 11375

To: Justin Reilly, Esq.
Neil H. Greenberg & Associates, P.C.
4242 Merrick Road,
Massapequa, New York 11758
justin@nhglaw.com